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Court, U.S
FILED

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WASTE RECOVERY ENTERPRISES, LLC.,

Petitioner,

-v-

TOWN OF UNADILLA and TOWN SUPERVISOR
JAMES A. WESTCOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court, pursuant to a common severance provision, may excise an exception from a criminal law to preserve the constitutionality of the law, as a result making the criminal law broader in application, rather than narrower, without public notice, a legislative hearing, or a vote of the legislative body?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The New York Court of Appeals (Pet. App. 1a) dismissed a direct appeal in this case stating that there was a lack of a substantial constitutional question. As it also did in *Clarkstown v. C & A Carbone*, 587 N.Y.S.2d 681, 182 A.D.2d 213 (App. Div. 1992), *lv. to appeal denied*, 605 N.E.2d 874, 80 N.Y.2d 760, 591 N.Y.S.2d 138 (1992), *cert. granted*, 508 U.S. 938 (1993), *rev'd and remanded*, 511 U.S. 383 (1994), the Court of Appeals denied leave to appeal (Pet. App. 1a). The Appellate Division of the State of New York (Pet. App. 4a), reported at *Waste Recovery Enters., LLC v. Town of Unadilla*, 742 N.Y.S.2d 715, 294 A.D.2d 766 (App. Div. 2002), affirmed the Decision and Order of the New York State Supreme Court for Otsego County (Pet. App. 10a-23a), which is unreported (Pet. App. 10a). The lower court decision struck down two companion local laws on the basis of *C & A Carbone* and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992).

STATEMENT OF JURISDICTION

The New York Court of Appeals denied leave to appeal on January 12, 2004. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Local Law No. One of 1988 of the Town of Unadilla is attached as Appendix B, 1b. The law is challenged pursuant to the United States Constitution Article I, Section 8, Clause 3 which states that "The Congress shall have the Power . . .To

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATEMENT OF THE CASE

Petitioner Waste Recovery Enterprises, LLC (WRE) after the Town of Unadilla (hereinafter "Town") stated it had no interest in the project, applied to the New York State Department of Environmental Conservation (DEC) for a permit to construct a materials recycling facility (MRF) and a construction and demolition debris (C & D) landfill. Subsequently, prior to any construction, a nearby waste transfer station closed. Petitioner modified its application to change the MRF to be a MRF and a waste transfer station. The DEC after a legislative hearing subsequently issued WRE a permit for the C &D landfill, the MRF and the waste transfer station. WRE then commenced construction of the MRF transfer station and landfill. When the landfill was substantially completed, an opponent of the project found two Town criminal laws which forbid the importation of waste into the Town. At that point, WRE commenced an action to declare those two laws unconstitutional.

Six months after the action was commenced, in a second amended Answer, the Town counterclaimed on an even older law, Local Law No.1 of 1988, a copy of which is attached (Pet. App. B 1b), which prohibited the operation or maintenance of a dump for the disposal of garbage and rubbish in the Town, but then in a different section excerpted from the law the disposal of non-commercial, non-industrial waste on the property from which the waste was generated. In short, that local law forbid the operation of a scientifically designed and engineered landfill, which imported waste into the Town while allowing dumps for the disposal of local waste (primarily farm dumps) of any type so long as commercial and industrial waste was not included.

At Special Term, the Town defended the exception for farm dumps and opposed deleting the exception. Despite the fact that no party advocated severing the exception from the law in the New York State Supreme Court, the court, relying on *Peake Excavating, Inc. v. Town Bd.*, 93 F.3d 68 (2d Cir. 1996), in which the Town had stipulated in the District Court to the severance exception, found the law unconstitutional as written, severed the exception pursuant to the generic severance provision in the law, and with the severance found the law constitutional as rewritten by the court. The question raised on this appeal was not raised in *Peake Excavating*.

On appeal and cross appeal to the Appellate Division, Third Department, the Appellate Division affirmed the lower court, but simply ignored in its decision the issues of federal constitutional law the Petitioner raised about the severance. *See Waste Recovery Enters., LLC v. Town of Unadilla*, 742 N.Y.S.2d 715, 294 A.D.2d 766 (App. Div. 2002). The New York State Court of Appeals dismissed the appeal as of right on the constitutional issues *sua sponte* on the basis that no substantial constitutional question was directly involved, and then, as it did in *C & A Carbone*, the New York State Court of Appeals denied leave to appeal. *See Waste Recovery Entes., LLC v. Town of Unadilla*, 799 N.E.2d 618, 100 N.Y.2d 614, 767 N.Y.S.2d 395 (2003).

REASONS FOR GRANTING THE WRIT

POINT I

THE LAW AS WRITTEN WAS UNCONSTITUTIONAL PURSUANT TO THE COMMERCE CLAUSE, ARTICLE I, SECTION 8

Local Law No. 1 of 1988, a criminal law, is a cookie cutter law adopted by many municipalities in New York State in the time frame in question in conjunction with other laws, which expressly forbid the importation of waste into the respective towns adopting the laws. Local Law No. 1 of 1988 was challenged pursuant to the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution as interpreted by the New York State Court of Appeals in *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 417 N.E.2d 74, 51 N.Y.2d 670, 435 N.Y.S.2d 962 (1980), and the United States Supreme Court in *Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. 353 (1992) and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

The New York Supreme Court relying on the above cases, found the law unconstitutional as written, but then pursuant to a generic severance provision, struck the exception to the law which allowed disposal of local waste, and as modified, found the law unconstitutional relying upon *Peake Excavating, Inc. v. Town Bd.*, 93 F.3d 68, 68 (2d Cir. 1996). In the process, the court made conduct criminal which had not previously been criminal without public notice, a public hearing, or publication which would be required to enact a new criminal law. The court at the same time struck down in their entirety two other town laws which explicitly banned the importation of waste into the Town.

A person in the Town looking at local laws in the Town Clerk's office or in the office of the New York State Secretary of State would not be able, in reviewing the local law, to determine they were able to engage in a criminal act if they disposed of their own waste on their property after the court's amendment of the local law.

POINT II

LEGISLATURES, NOT COURTS, ENACT CRIMINAL LAWS

In striking the exception to preserve the law, but in the process creating criminal liability for people who were not previously liable, Special Term judicially legislated a new and broader criminal law in violation of the United States Supreme Court's ruling in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), and the admonition that Legislatures, not courts, enact criminal statutes. *See United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Crandon v. United States,* 494 U.S. 152, 158 (1990) (*quoting Liparota v. United States*, 471 U.S. 419, 427 (1985).

POINT III

SEVERANCE PROVISIONS MUST BE REVIEWED IN THE CONTEXT OF EACH PARTICULAR PROPOSED SEVERANCE

Under New York law, even though a local law contains a severance provision, the presence of such a clause is not dispositive. *See New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation*, 550 N.E.2d 155, 157, 75 N.Y.2d 88, 94, 550 N.Y.S.2d 879, 881 (1989).

Severance is inappropriate when the valid and invalid provisions would leave a regulatory scheme that the legislative body never intended. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 202, 206-07, 230 N.Y. 48, 60 (1920).

As this Court has stated, penal statutes must be construed strictly, *United States v. Reese*, 92 U.S. 214, 219 (1875). *See also* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 87-88 (1937) (there is a difference between civil and criminal statutes, and "words of limitation can not be read into the former [penal consequences], since such statutes must be strictly construed." *Id.*). As this Court said in *Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924), the ordinary principals of separability should be applied to a statute even though it contains a separability clause. Such a clause is an aid only, and "not an inexorable command." *Id.* at 290. And as the Court concluded in *United States v. Raines*, 362 U.S. 17, 24 (1960): "As we have indicated, that decision may have drawn support from the assumption that if the Court had not passed on the statutes's validity *in toto* it would have left standing a criminal statute incapable of giving fair warning of its prohibitions."

That is exactly what the New York State courts have done in this case: the courts have left standing a criminal statute which is "incapable of giving fair warning of its prohibitions" because the broader criminal law resulting from the severance will not be evidenced in the NYS Secretary of State's Office where the law is filed or in the Town Clerk's Office where the law is filed. *Id.*

CONCLUSION

The striking of an exception to a common cookie cutter criminal law pursuant to a standard severance provision, making the criminal law broader in impact than what had been adopted by the legislative body after public notice and a public hearing amounts to judicial legislation, violates the Constitution and must be overturned because people who operate in violation of the judicially amended law would have no notice that there conduct, previously legal, is now criminal.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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Appendix A

Appendix A

Order Denying Leave to Appeal to the NYS Court of Appeals

JANUARY 12, 2004

CASES

3-10 Mo. No. 1217
Waste Recovery Enterprises, LLC,
Appellant-Respondent,
v.
Town of Unadilla, et al.,
Respondents-Appellants.

Motion and cross motion for leave to appeal denied.

Order of the NYS Court of Appeals *sua sponte* on the ground no substantial constitutional question is directly involved

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of September 2003

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1026 SSD 41

Waste Recovery Enterprises, LLC,
Appellant-Respondent,
v.
Town of Unadilla, et al.,
Respondents-Appellants.

The appellant-respondent having filed notice of appeal and respondents-appellants having filed a cross appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal and cross appeal be and the same hereby are dismissed without costs, by the Court sua sponte, each upon the ground that no substantial constitutional question is directly involved.

s/Stuart M. Coehn
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION September 23, 2003

Mo. No, 1026 SSD 41
Waste Recovery Enterprises, LLC,
Appellant-Respondent,
v.
Town of Unadilla, et al.,
Respondents-Appellants.

Appeal and cross appeal dismissed, without costs, by the Court sua sponte, each upon the ground that no substantial constitutional question is directly involved.

Memorandum and Order of the NYS Supreme Court Appellate Division, Third Judicial Department affirming the Decision and Order of the NYS Supreme Court County of Otsego

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2002 90477

WASTE RECOVERY ENTERPRISES LLC,
Appellant-Respondent,

v MEMORANDUM AND ORDER

TOWN OF UNADILLA et al.,
Respondents-Appellants.

Calendar Date: March 28, 2002

Before: Crew III, J.P., Peters, Mugglin, Rose and Lahtinen, JJ.

Green & Seifter P.L.L.C., Syracuse (Richard J. Brickwedde of counsel), for appellant-respondent.

Albert E. Clune, Sidney, for respondents-appellants.

Crew III, J.P.

Cross appeals from an order of the Supreme Court (Dowd, J.), entered September 13, 2001 in Otsego County, which, inter alia, partially granted plaintiff's cross motion for summary judgment and declared Local Laws, 1989, No. 1 of the Town of Unadilla and Local Laws, 1992, No. 4 of the Town of Unadilla unconstitutional.

In June 1998, plaintiff applied to the Department of Environmental Conservation (hereinafter DEC) for permits to build and operate a solid waste transfer station and a construction and demolition debris landfill in respondent Town of Unadilla in Otsego County. Following notice in April 1999 to the Town of plaintiff's application and the issuance of construction permits for the two projects in June 1999, plaintiff constructed the transfer station and landfill. Thereafter, in May 2000, the Town notified DEC of two laws affecting plaintiff's proposed operations, to wit: Local Laws, 1989, No. 1 of the Town of Unadilla (hereinafter the 1989 law) prohibiting the importation of solid, radioactive and hazardous waste into the Town, and Local Laws, 1992, No. 4 of the Town of Unadilla (hereinafter the 1992 law) prohibiting the importation of medical waste into the Town. As a consequence, plaintiff commenced this declaratory judgment action against the Town and respondent Town Supervisor challenging the constitutionality of these local laws. Defendants answered and asserted a counterclaim seeking to enjoin plaintiff from operating the transfer station and landfill predicated upon the foregoing local laws, as well as Local Laws, 1988, No. 1 of the Town of Unadilla (hereinafter the 1988 law), which prohibits the operation and maintenance of a dump in the Town. Plaintiff replied seeking a judgment declaring the 1988 law unconstitutional.

Defendants thereafter moved for summary judgment dismissing plaintiff's complaint, seeking a declaration that each of the local laws was constitutional and for injunctive relief, and plaintiff cross-moved for summary judgment declaring each of the local laws unconstitutional. Additionally, plaintiff sought, inter alia, a declaration that the 1988 law did not apply to the operation of a transfer station. Supreme Court found each of the local laws, as written, unconstitutional, but severed a portion of the 1988 law and found it, as modified, to be constitutional. As a consequence, the court enjoined plaintiff from operating its landfill. Supreme Court further found, however, that the 1988 law did not apply to transfer stations and denied defendants' request for injunctive relief to that extent. Plaintiff and defendants now appeal.

The 1988 law, as enacted, prohibited the operation or maintenance of a dump for the disposal of garbage and rubbish in the Town. However, section 4 of the 1988 law excepted from its prohibition the disposal of noncommercial or nonindustrial rubbish, waste material and garbage by Town residents on their own property, and section 6 of the 1988 law contained a severability clause. Supreme Court found, and in our view correctly so, that the 1988 law, the 1989 law and the 1992 law each discriminated against interstate commerce and, thus, violated the Commerce Clause of the US Constitution (US Const, art I, § 8, cl 3). As to the 1988 law, Supreme Court severed section 4 thereof, holding that the remaining provisions were not constitutionally infirm.

Initially, plaintiff contends that Supreme Court erred in severing section 4 of the 1988 law. We disagree. It is axiomatic that a court should refrain from declaring a statute unconstitutional when only a portion thereof is objectionable, and this is particularly true when the law contains a severability

clause (see, Town of Islip v Caviglia, 141 AD 148, 167, affd 73 NY2d 544; see also, Matter of New York State Superfund Coalition v New York State Dept. of Envtl Conservation, 75 NY2d 88, 94). In the final analysis, however, when determining whether to severe a statute, the ultimate test is whether the enacting body, if partial invalidity had been foreseen, would have desired enforcement of the statute absent the invalid part (see, People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60, cert denied 256 US 702).

Here, a reading of the 1988 law makes plain that the Town Board, had it foreseen that section 4 thereof would be declared unconstitutional, would have intended the enforcement of the nonoffending portion. In its declaration of purpose in enacting the 1988 law, the Town Board provided that it had determined that the operation of dumps were likely to constitute a hazard to the health and safety of Town residents and, therefore, it was the intent of the 1988 law to prohibit the operation of dumps in the Town to protect against such hazard. The underlying purpose of the 1988 law will be served despite the severance of section 4 and, indeed, would be frustrated if the entire local law was declared unconstitutional. Notably, the Town has not contested the severance of section 4 on this appeal lending credence to the conclusion that the Town Board would favor enforcement of the 1988 law absent the offending language (see, Peake Excavating v Town Bd. of Town of Hancock, 93 F3d 68, 73).

Next, plaintiff contends that the Town should be estopped from enforcing the 1988 law. Again, we disagree. The basis of plaintiff's argument is that its managing partner, Denton Reed, had conversations with the Town Supervisor and two members of the Town Board regarding the construction, each of whom stated, variously, that it was "none of our business" and that the Town had no interest in the project. From these statements

plaintiff concluded that there were no laws or ordinances regarding such construction.[1] The import of such statements, however, is significantly diminished by the fact that Town officials apparently believed that DEC was charged with the authority to make any determinations regarding the proposed construction. Indeed, in a letter to DEC, the Town Clerk stated:

> The Town Officials have been under the impression that [DEC] has been guiding the proposed [sic] and/or operation on this site at the intersection of State Highway 7 and 8, and with that in mind, there wasn't a concern that [plaintiff] would not be supported in the Township.

It is axiomatic that "estoppel may not be invoked against a governmental agency to prevent it from discharging its statutory duties" (Matter of E.F.S. Ventures Corp. v Foster, 71 NY2d 359, 369) and, further, that application of the doctrine should be made "only when failure to do so would operate to defeat a right legally and rightfully obtained" (Matter of Hauben v Goldin, 74 AD 804, 805). Notably, estoppel cannot "operate to relieve one from the mandatory operation of a statute" (*id.*, at 805) and may not be invoked where reasonable diligence by a good-faith inquirer would have disclosed the existence of the statute (see, Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 279, appeal dismissed, cert denied 488 US 801).

As noted previously, there is no assertion that plaintiff's representatives made specific inquiry regarding any statutes affecting the construction and/or operation of a landfill in the

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[1] Of significance is the fact that plaintiff never has asserted that, in response to a direct inquiry, it was advised by Town officials that there were no restrictions on dumping or the importation of waste into the Town.

Town or that they made any efforts to ascertain the existence of any laws or regulations with regard thereto. Indeed, the Town asserts that the laws in question were duly filed with the Secretary of State and were, therefore, a matter of public record. In further support of its estoppel argument, plaintiff references a Town Board meeting on August 10, 1999 wherein the Town Clerk reported that she had received an inquiry regarding the possibility of constructing another waste recovery site in the Town. The Town Clerk was advised by a member of the Town Board that the Town had no restrictions, ordinances or regulations regarding the building of such a facility. Two observations must be made regarding that representation, however. First, none of plaintiff's representatives was present at the meeting, and the foregoing statement clearly was not made in response to an inquiry by plaintiff. Second, by the time such statement was made, construction already was underway and, therefore, it cannot be concluded that plaintiff relied upon said assertion in constructing its facilities. We have considered the parties' remaining assertions, including defendants' assertion that Supreme Court erred in concluding that the transfer station does not qualify as a dump under the 1988 law, and find them unavailing.

Peters, Mugglin, Rose and Lahtinen, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

Decision and Order of the NYS Supreme Court
County of Otsego

At a Motion Term of the Supreme Court of the State of New York, held in the County of Chenango at the Court House in Norwich, New York, on the 16th day of March, 2001.

PRESENT: **HON. KEVIN M. DOWD**
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT: COUNTY OF OTSEGO

WASTE RECOVERY ENTERPRISES, LLC,

Plaintiff,

vs.

Index # 5755
RJI # 2001-0056

TOWN OF UNADILLA and TOWN SUPERVISOR JAMES A. WESTCOTT,

Defendants.

DECISION AND ORDER

The Court has before it two motions. The Defendants (hereinafter referred to as the Town) have made a motion for summary judgment. In support of that motion, the Town has submitted the Affidavit of Defendant James S. Westcott, the

affidavit of Town Clerk Janice C. Cole, the Affidavit in Opposition of Mr. Westcott, together with all attached exhibits, and a Memorandum of Law. Plaintiff (hereinafter referred to as WRE) has cross-moved for declaratory relief. In support of its own motion and in opposition to the Town's motion, NVRI! has presented the AftidaAit of WRE Managing Partner Denton Reed, the Reply Affidavit of Mr. Reed, all with annexed exhibits, a letter reply dated May 25, 200 1, and two Memorandums of Law dated February 20 and March 15, 200 1. There being no objection, the Court has Ko accepted an amicus curiae brief from the County of Otsego in support of the Town's position. The parties appeared for oral argument on March 16, 2001 at the Chenango County Court House.

STATEMENT OF FACTS

This case arises out of three local laws of the Town of Unadilla pertaining to solid waste within the Town. WRE has commenced a Declaratory Judgment action challenging **Local Law 1 of 1988** which prohibits dumps in the Town, **Local Law 1 of 1989** which prohibits the importation of radioactive, hazardous and solid waste into the Town, and **Local 4 of 1992** which further prohibits the importation of medical waste into the Town. All three laws were duly filed with the New York Secretary of State's office.

WRE operates a gravel mine located within the Town. On or about June 1998, WRE aplied to the Department of Envorionmental Conservation (hereinafter referred to as the DEC) for permits to build and operate a solid waste transfer station and a 3 acre construction and demolition (C&D) debris landfill. At the April 13, 1999, Town Board meeting the Town received notice of the application from the DEC. On or about

June 1999, the DEC issued a construction permit to WRE for both projects.

Thereafter, at a Town Board meeting on August 10, 1999, Councilman Peter Fitzgerald told the Town Clerk that the Town Board did not have any restriction, ordinances or regulations regarding the building of a waste recovery site in the Town. The statement came in response to an inquiry by an individual about building another waste recovery site within the Town. No one from WRE was present at this meeting. However, Mr. Reed alleges that on several other occasions Town officials informed him that the Town had no interest in the projects. The Town Clerk did forward copies of the local laws to the DEC on May 10, 2000. WRE then commenced this Declaratory Judgment action on or about July 18, 2000. On November 17, 2000, the DEC issued a permit to WRE to operate both the transfer station and the C&D landfill.

WRE's Complaint seeks to have **Local Law 1 of 1989** (hereinafter referred to as the 1989 Law) and **Local Law 4 of 1992** (hereinafter referred to as tile 1992 Law) declared unconstitutional and void. At the commencement of this action, WRE was not aware of **Local Law 1 of 1988** (hereinafter referred to as the 1988 Law). It did not become aware of its existence until the Town moved to amend its Answer to include a Counterclaim based upon the 1988 Law. WRE consented to the Second Amended Answer being served and has addressed the 1988 Law in its Reply.

The Town's motion seeks summary judgment denying all the relief requested by WRE, declaring the three local laws constitutional and granting a permanent injunction preventing WRE from operating a dump, landfill or transfer station in the Town. WRE's cross motion seeks a declaration that all three

laws are unconstitutional and the granting of an injunction of the enforcement of the laws by the Town.

CONCLUSIONS OF LAW

The Court will begin with the Town's assertion in its Answer that WRE lacks standing to bring this suit and that the controversy is not ripe. The Court notes that the Town has not pursued this issue in either its submissions or at oral argument. The facts are clear that WRE has expended a great deal of money to construct the landfill and transfer station. If the three local laws are interpreted as urged by the Town, WRE will be unable to lawfully operate either venture. Moreover, violation of any of the local laws is a criminal offense. Clearly, WRE has standing to pursue this action and the controversy is ripe for judicial intervention. **See Dairylea Coop. v. Walkley, 38 NY2d 6, 339 NE2d 865, 377 NYS2d 451 (1975).**

The next issue to be addressed is the validity of the 1988 Law. The law provides "The operation or maintenance of a dump for the disposal of garbage and rubbish is hereby prohibited in the Town of Unadilla." **Local Law 1 of 1988, §3.** The law provides an exception for the disposal of non-commercial or non-industrial rubbish, waste material and garbage on the property upon which it is produced. WRE claims that the law is unenforceable because it violates the **Commerce Clause, Article 1, sec. 8, cl. 3 of the United States Constitution,** and is inconsistent with **Article 27 of the Environmental Conservation Law**. Additionally, WRE argues that the 1988 Law applies to neither C& D landfills nor transfer stations. The Court will consider the arguments in the order set forth.

Just as the facts of this case are not generally disputed, so too there is no dispute as to the controlling law. The Commerce

Clause provides in pertinent part that Congress "shall have Power ... to regulate Commerce ... among the several States." **U.S. Const. art. 1, §8, cl. 3**. More important for our analysis is the negative aspect of the Commerce Clause which prevents the States from unjustifiably discriminating against or burdening interstate commerce. **Gary D. Peake Excavating, Inc. v. Town of Hancock, 93 F3d 68 (2d Cir. 1996)**. The United States Supreme Court has repeatedly held that waste, though it lacks value, is an article of commerce subject to constitutional protection. **Fort Gratiot v. Michigan, 504 US 353 (1992); Philadelphia v. New Jersey, 437 US 617 (1978).** As a result, there have been numerous cases dealing with the Commerce Clause and solid waste.

Of great assistance to our present case is the case of **Gary D. Peake Excavating, Inc. v. Town of Hancock**. **Gary D. Peake Excavating, Inc. v. Town of Hancock, 93 F3d 68 (2d Cir. 1996)**. The Court provides a useful synopsis of the United States Supreme Court's two-step approach to determine whether a law violates the Commerce Clause. **Peake at 73**. First, it must be determined whether the challenged law evenhandedly regulates with only incidental effects on interstate commerce or discriminates against interstate commerce. Second, the appropriate level of scrutiny is applied depending on the first finding.

The local law at issue in the **Peake** case is nearly identical to the Town's 1988 Law. In **Peake**, the Court found no discriminatory effect nor incidental burdens on interstate commerce. **Peake, at 74**. The Hancock local law had, however, been altered by the District Court. The lower court had found that the section regarding exceptions, which is virtually the same as the exception section of the Town's 1988 Law, was unconstitutional because it discriminated against certain waste

based only on its point of origin. **See Gary D. Peake Excavating, Inc. v. Town of Hancock. Gary D. Peake Excavating, Inc. v. Town of Hancock, 1995 US Dist. LEXIS 19050 (N.D.N.Y. 1995).**

WRE urges that because of the exception contained in the 1988 Law, that law is unconstitutional. WRE draws the Court's attention to the **Fort Gratiot v. Michigan** and **C&A Carbone Inc. v. Town of Clarkstown** cases. **Fort Gratiot v. Michigan, 504 US 353 (1992); C&A Carbone Inc. v. Town of Clarkstown, 511 US 383 (1994).** In **Fort Gratiot**, a Michigan law prevented counties from accepting solid waste that was not generated from within that county, unless the receiving county explicitly authorized such acceptance in its solid waste management plan. The Supreme Court held that, even though the law treated out-of-county waste the same as out-of-state waste, the law still violated the Commerce Clause. **Fort Gratiot, 504 US at 362.** The law allowed each county to isolate itself from the national economy and treated waste differently solely on the basis of its origin. **Fort Gratiot, 504 US at 361.**

In **C&A Carbone**, the Supreme Court likewise invalidated a town ordinance that required all waste within the town to be processed at a designated transfer station before leaving the town. Such an ordinance is known as a flow control ordinance. **C&A Carbone Inc. v. Town of Clarkstown, 511 US 383 (1994).** The Court found that it was the service of processing and disposing of waste that was the article of commerce. The Court further found that the ordinance clearly discriminated since it allowed only one favored operator to process waste within the town.

WRE also points out the New York State Court of Appeals' case **Dutchess Sanitation Service, Inc. v. Town of Plattekill.**

Dutchess Sanitation Service, Inc. v. Town of Plattekill, 51 NY2d 670, 417 NE2d 74, 435 NYS2d 962 (1980). In that case, a town ordinance prohibited anyone other than those who resided or conducted business in the town from depositing waste within the town that came from out of the town. The Court of Appeals found that the ordinance clearly regulated waste based upon it place of origin and therefore discriminated against interstate commerce. **Dutchess, 51 NY2d at 676.**

This Court notes that a significant factor for the Court of Appeal in the **Dutchess** case appears to have been the conceded fact that out-of-state entities wanted to use the landfill located in the town. **51 NY2D at 676**. Such was not the case in the **Monroe-Livingston** case, which had a similar law, but opposite holding by the Court of Appeals. **See Monroe-Livingston v. Caledonia, 51 NY2d 679, 417 NE2d 78, 435 NYS2d 966 (1980).** However, this sort of differentiation appears to be prohibited now by the holding of Fort Gratiot. Fort Gratiot v. Michigan, 504 US 353 (1992).

The 1988 Law does discriminate based on place of origin in its exception section. **Town Law 1 of 1988, §4**. The crucial question though is if it discriminates against interstate commerce. **See Peake, 93 F3d at 74**. It must be kept in mind that WRE has already conceded that the Town has the authority to completely ban all dumps. The more specitic question then is whether the exception section has any effect on interstate commerce. Perhaps the County of Otsego is correct that the exception was designed to protect farmers who operate small dumps. However, the effect is that it allows anyone, including WRE, to dispose of waste on-site. Of course there has to be compliance with all applicable DEC regulations. As a result, WRE has an approved landfill facility, but under the 1988 law is prohibited from utilizing it for any purpose other than its own

qualifying waste. The effect of such a restriction on commerce, including interstate commerce, is apparent.

The Town has pointed out numerous instances where WRE has indicated that it would be dealing with local waste. WRE, however, has presented a letter from an out-of-state individual inquiring about utilizing WRE's facility. The Court does not believe that either claim is particularly relevant. It is the discrimination based solely on the place of origin that is controlling. **Fort Gratiot, 504 US at 363**.

Such discrimination mandates the strictest scrutiny of the law. **Peake, 93 F3d at 74**. The Town had means to promote and protect the health and safety of its resident other than by discrimination. As a result, the exception clause of the 1988 Law violates the Commerce Clause.

WRE would next have the Court invalidate the entire law. The Court declines to do so. Case law holds that the standard regarding the appropriateness of severance is whether the legislature, if it had foreseen partial invalidity, would have wished the statute enforced with the invalid part struck or rejected altogether. **People v. Knapp, 230 NY 48, 129 NE 202 (1920)**. The 1988 Law contains a severability provision. **Local Law 1 of 1988, §6**. The intent of the Town Board is thus clear. Since Local Law 1 of 1988 can function without section 4, that unconstitutional section is severed from Local Law 1 of 1988.

There can be little question that the remaining contents of the 1988 Law are constitutional. The complete ban that now exists does not discriminate against any waste based on its place of origin. Therefore, there can be no burden on interstate commerce that is not placed on locally generated waste. **See Peake, 93 F3d at 74**. Furthermore, the law seeks to protect the

health and safety of the Town's residents from the hazard and menace of the disposal of garbage and rubbish. **Local Law 1 of 1988, §1.** This is a legitimate local concern. Accordingly, the Court holds that **Local Law 1 of 1988 of the Town of Unadilla** is constitutional.

WRE also argues that the law must be invalidated because it is inconsistent with **Article 27, Title 7 of the New York State Environmental Conservation Law (ECL). ECL §27-0711** allows counties, cities, towns or villages to adopt local laws which are not inconsistent with **Title 7 of Article 27. Title 7 of the ECL** establishes the framework of the DEC's regulation and control over solid waste management and resource recovery facilities. **See ECL §27-0703**. WRE points out that the 1988 Law does not define the terms garbage, rubbish, dump, commercial, industrial or waste material, while the ECL or its regulations do define the terms garbage, commercial and industrial. WRE claims that the Town law in not consistent with the ECL, because the 1988 Town law uses terms undefined and terms not used in the ECL or its regulations. The Court finds no basis for this claim.

To begin with, WRE acknowledges that there is no case law nor practice commentary that supports it position. The Court of Appeals has held that **Art 27 of the ECL** does not supercede nor pre-empt the enactment of local ordinances that are consistent with at least the minimum applicable requirements of the ECL. **Monroe-Livingston v. Caledonia, 51 NY2d 679, 417 NE2d 78, 435 NYS2d 966 (1980); ECL §27-0711.** In fact, it has even been held that more restrictive local laws, such as a complete ban on solid waste facilities, is not inconsistent with Title 7 of the ECL. **LaGrange v. Giovenetti, 123 AD2d 688, 57 NYS2d 54 (2nd Dep't 1986).**

An inconsistency argument could be made if the Town law actually used definitions that were not consistent with Title 7 definitions or were less restrictive. That is not the case. Instead, the local law provides no definitions. Obviously, those undefined terms, which do not have definitions through Title 7 of the ECL, cannot be inconsistent with Title 7. Similarly, there is no inconsistency of the remaining undefined terms that do have definitions through Title 7 of the ECL. Their definitions are simply governed by the ECL. Therefore, the Court finds no inconsistency between **Title 7 of the ECL** and the 1988 law as altered by the Court herein..

Likewise, the Court does not agree with WRE's argument that the 1988 Law does not apply to its C&D debris landfill. WRE's assertion is premised upon the fact that the term C&D is not used in the Town Law. As set forth above, the 1988 Law prohibits the operation or maintenance of a dump for the disposal of garbage and rubbish. **Local Law 1 of 1988, §3**. The term "dump" is defined in the local law as "a place used for the disposal and leaving of paper, garbage, rubbish and **waste materials of any nature** by the public or by any person." (emphasis added) **Local Law 1 of 1988, §2**. The Court recognizes that C&D debris is not garbage as that term is defined by the regulations and that rubbish is undefined by the 1988 law and the **ECL**. **See 6 NYCRR §36-1.2(b)(73).** However, the ordinary meaning of the word "rubbish" is "useless waste or rejected matter." **Webster's New Collegiate Dictionary 1002 (1981).** Moreover, as WRE notes, the regulatory definition of construction and demolition debris is "Uncontaminated solid **waste**..." (Emphasis added) **6 NYCRR §36-1.2(b)(38).** Since a "dump" is used for the disposal of "waste materials" and costruction and demolition debris is "waste," the 1988 Law encompasses a C&D debris landfill.

The Court does hold, however, that the 1988 Law does not apply to a "transfer station". The only reference to transfer stations in the 1988 Law is the second sentence of the exception section, which states, "Nothing herein contained shall be deemed to prohibit a Town-sponsored transfer station of rubbish, waste material and garbage produced by town residents." **Local Law 1 of 1988, §4**. The Court has already held this section of the local law to be unconstitutional and has severed it from the rest of the law. Even if this section were still relevant, that exception alone cannot alone be read to bar transfer stations in the town. As set forth above, the 1988 Law prohibits dumps and defines them as places for the disposal and leaving of waste materials. **Local Law I of 1988, §§2 and 3**. The regulatory definition states, "Transfer station means a solid waste management facility other than a recyclables handling and recovery facility, used oil facility, or a construction and demolition debris processing facility, where solid waste is received for the purpose of subsequent transfer to another solid waste management facility for further processing, treating, transfer or disposal." **6 NYCRR §36-1.2(b)(172)**. Under such definition, there can be no argument that a transfer station qualifies under the 1988 Law as a "dump." In fact, at oral arguments, the Town's attorney conceded that the 1989 and 1992 Laws were passed because the 1988 Law didn't clearly apply to transfer stations.

The Court next turns its attention to the 1989 and 1992 Laws. As previously stated, WRE's Complaint challenges the validity of both of these laws on constitutional grounds. The 1989 Law provides, "The importation of solid waste, hazardous waste and/or radioactive waste for the purpose of collection, storage and/or disposal within the Town of Unadilla is strictly prohibited.." **Local Law 1 of 1989, §4.** The definition of "importation" is stated as "To bring materials into the Town of

Unadilla for the purpose of collection, storage and/or disposal, excluding the transportation of materials through the Town of Unadilla. **Id. at §5**. The 1992 Law is identical to the 1989, except that it adds medical waste to the materials that cannot be imported and provides a definition for "medical waste". **Local Law 4 of 1992, §§ 4 and 5**. While it would appear that the 1992 Law was intended to replace the 1989 Law, there is no provision for such replacement and both laws exist on the Town books. Because of their similarity, both laws will be treated simultaneously.

There can be little doubt that both laws violate the Commerce Clause. While there are numerous cases relevant to this issue, the Court will limit its analysis to the cases it has previously cited herein. **Fort Gratiot v. Michigan, 504 US 353 (1992); C&A Carbone Inc. v. Town of Clarkstown, 511 US 383 (1994); Dutchess Sanitation Service, Inc. v. Town of Plattekill, 51 NY2d 670, 417 NE2d 74, 435 NYS2d 962 (1980).** The two laws clearly treat waste materials differently based upon their place of origin. Only waste materials imported into the Town are prohibited. The laws in no way affect the same waste materials that are generated within the Town. As noted above, the New York Court of Appeals has long ago held that such differentiation is impermissible. **Dutchess, 51 NY2d at 676**. Moreover, the United States Supreme Court has invalidated this kind of unambiguous discrimination. **Fort Gratiot, 504 US at 366.** The argument that this is not discriminatory legislation since all out of town as well as out of state waste is prohibited was also soundly rejected by the Supreme Court. **Id. 504 at 361**. The Supreme Court held,

> "We disagree, for our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the

movement of articles of commerce through subdivisions of the state, rather than through the State itself " **Id.**

The declared purpose of "promoting the health, safety and general welfare of the people of the Town of Unadilla, including the protection and preservation of the environment and its inhabitants..." is laudable and proper. **Local Law 1 of 1989, §2; Local Law 4 of 1992, §2**. However, the Town has not met its burden of proving that these concerns cannot be adequately served by nondiscriminatory alternatives. **See Fort Gratiot, 504 US at 366**. There has been no explanation as to how the health and safety of the town residents is served by protection from waste materials generated outside of, but not inside of, the town.

Lastly, the Court addresses WRE's contention that the Town should be estopped from enforcing its local laws. WRE argues that the Town had notice of its permit application and claims that various Town officials repeatedly stated that the Town had no interest in the projects. Because WRE had no knowledge of the three Town laws, it expended a great deal of money to construct the landfill and transfer station.

These factors do not warrant estoppel of the Town's enforcement of its valid laws. WRE recognizes that estoppel against a governmental body of its statutory duties occurs only as a rare exception. **See Parkview Assoc. v. City of New York, 71 NY2d 274, 519 NE2d 1371, 525 NYS2d 176 (1988)**. The Court of Appeals has held that this exception, "may not, in any event, be invoked in this case where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error." **Id. 71 NY2d at 279**. In the **Parkview** case, a building permit had erroneously been issued to allow a thirty one story building in an area where the maximum height was

nineteen stories. When the error was discovered the construction had already advanced beyond nineteen stories.. **Id. 71 NY2d at 280**. Even though the builders had relied upon the issuance of the building permit, the Court held that with reasonable diligence the builders could have determined that the correct height limit. **Id. 71 NY2d at 282.** In the present case, WRE only had to check the local laws to discover their existence. There is no proof nor allegation that WRE took any steps to determine whether any applicable local law(s) existed. The failure to do so certainly does not evince reasonable diligence by a good-faith inquirer.

Based upon the foregoing, **Local Law 1 of 1988 of the Town of Unadilla,** as modified herein, is declared constitutional and valid. Plaintiff Waste Recovery Enterprises, LLC, is enjoined from operating a construction and demolition debris landfill and/or dump in violation of **Local Law 1 of 1988 of the Town of Unadilla**, as modified herein. **Local Law 1 of 1989 of the Town of Unadilla** and **Local Law 4 of 1992 of the Town of Unadilla** are declared unconstitutional.

This Decision shall constitute the Order of the Court.

Dated: September 6, 2001
Norwich, New York

s/ Kevin M. Dowd
Supreme Court Justice

Appendix B

Appendix B

Local Law No. One of the Town of Unadilla of the year 1988

(Please Use this Form for Filing your Local Law with the Secretary of State)

Text of law should be given as amended. Do not use brackets for matter to be eliminated and do not use italics for new matter.

Town of UNADILLA

Local Law No. One of the year 1988

A local law PROHIBITING THE OPERATION OF A DUMP
(Insert title)

Be it enacted by the Town Board of the
(Name of Legislative Body)
Town of Unadilla as follows:

Section 1. Declaration of Policy: it is hereby determined by the Town Board that the operation of dumps for the disposal of garbage and rubbish are likely to constitute a hazard and menace to health and safety of the residents of the Town of Unadilla and it is therefore the intent of this Local Law to prohibit the operation of dumps for the disposal of garbage and rubbish in the Town of Unadilla pursuant to § 130 subdivision (6) and (15) of the Town Law of the State of New York.

Section 2. Definitions: The term "person" an used in this Local Law shall include an individual, firm, partnership, corporation, municipality or association of persons. The term "dump" as used in the Local Law shall mean a place used for the disposal and

leaving of paper, garbage, rubbish and waste materials of any nature by the public or by any person.

Section 3. Restrictions: The operation or maintenance of a dump for the disposal of garbage and rubbish is hereby prohibited in the Town of Unadilla.

Section 4. Exceptions: Nothing herein contained shall be deemed to prohibit any person from disposing of non-commercial or non-industrial rubbish, waste material and garbage on property upon which such rubbish, waste material and garbage is produced. Nothing herein contained shall be deemed to prohibit a Town-sponsored transfer station of rubbish, waste material and garbage produced by town residents.

Section 5. Penalties: Any person, violating any of the provisions of this Local Law shall be guilty of a misdemeanor and upon conviction thereof be punished by a fine not exceeding $1,000.00 for each offense or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment. The Town Board shall also have the power to bring a civil action to restrain any violation of the Local Law in a court of competent jurisdiction. When a violation of this Local Law is continuous. each 24 hours thereof shall constitute a separate and distinct offense.

Section 6. The invalidity of any Section or provision of this Local Law shall not invalidate any other section or provision thereof.

Section 7. This Local Law shall take effect immediately upon filing with the New York State Secretary of State's Office.

Supreme Court, U.S.
FILED
MAY 14 2004
OFFICE OF THE CLERK

(2)

No. 03-1390

IN THE

Supreme Court of the United States

WASTE RECOVERY ENTERPRISES, LLC.,

Petitioner,

-v-

TOWN OF UNADILLA and TOWN SUPERVISOR JAMES A. WESTCOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a proper application of New York's severability doctrine by a state court, pursuant to which a town ordinance, imposing criminal sanctions for a violation thereof, which bars the operation of a dump for the disposal of waste is upheld after the court struck down as unconstitutional an exception to the ordinance permitting the operation of a dump for waste on the property from which the waste was generated, is nonetheless constitutionally infirm because it creates an ordinance broader in application than the ordinance was when initially enacted without any further legislative approval.

2. Whether a proper application of New York's severability doctrine by a state court in the above referenced circumstances is nonetheless constitutionally infirm because it fails to give proper notice to the populace that conduct permissible under the exception is now in violation of the ordinance and punishable as a misdemeanor.

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STATEMENT OF THE CASE

A. Petitioner's Constitutional Challenges

The respondent Town of Unadilla is a rural community located in the southern tier of Otsego County, New York. In 1988, the Town adopted Local Law 1 of 1988, a copy of which is annexed to petitioner's petition (Pet. App. B1b), which prohibited in Section 3 the operation or maintenance of a dump for waste in the Town. This local law was adopted under authority given to the Town to regulate solid waste under the New York State Municipal Home Rule Law and New York State Town Law §§130(6) and (15). As set forth in the law's "Declaration of Policy" in Section 1, the Town Board in enacting the law sought to protect town residents from potential hazards and health risks arising out of dumps. However, the local law in Section 4 expressly exempted waste disposed of on the property which produced it. This exemption was designed to provide relief for farms by allowing them to operate small farm dumps in connection with their farming activities.

Subsequently, in 1989 the Town Board enacted Local Law 1 of 1989, which prohibited the importation into the Town of radioactive wastes, hazardous wastes, and solid wastes. Then in 1992, the Town Board reenacted the law as Local Law 4 of 1992 and added medical waste to the list of waste prohibited from being imported into the Town.

In June 1998, petitioner applied to the New York State Department of Environmental Conservation ("DEC") for permit to build and operate a solid waste transfer station and a construction and demolition debris landfill in the Town. Following notice in April 1999 to the Town of petitioner's application and the issuance of construction permits for the two projects in June 1999, petitioner constructed the transfer stations and landfill. Thereafter, in May 2000, the Town notified DEC

of the existence of Local Law 1 of 1989 and Local Law 4 of 1992, which laws would adversely affect petitioner's operation of the transfer station and landfill. At that time, the Town did not cite to Local Law 1 of 1988.

Petitioner then commenced a declaratory judgment action against the Town and its Supervisor, respondent James A. Westcott, wherein the constitutionality of these two local laws was challenged. Respondents answered and asserted a counterclaim seeking to enjoin plaintiff from operating the transfer station and landfill, predicated upon these two local laws and Local Law 1 of 1988 as well. Petitioner replied seeking a judgment declaring that Local Law 1 of 1988 was unconstitutional as well.

In essence, petitioner sought to declare in their entirety Local Law 1 of 1988, Local Law 1 of 1989 and Local Law 4 of 1992 as unconstitutional. Petitioner's constitutional challenge was based upon the Commerce Clause, relying upon several decisions of this Court, including *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Res.*, 504 U.S. 353 (1992).

B. Decisions Below

New York State Supreme Court addressed the constitutionality of all three local laws, as argued by petitioner. (Pet. App. 10a-23a). Initially, it struck down as unconstitutional Section 4 of Local Law 1 of 1988, the law's exemption section, on the basis that the section discriminated against interstate commerce and, thus violated the Commerce Clause. Rejecting petitioner's argument to declare as a result the entire local law as unconstitutional, Supreme Court instead severed that section

from the rest of the local law, pursuant to New York's severability doctrine, and found that the remaining part, including Section 3's ban on the operation of a dump, to be constitutional. Supreme Court then found Local Law 1 of 1989 and Local Law 4 of 1992 unconstitutional as they, like Section 4 of the 1988 law, discriminated against interstate commerce.

As a result of its conclusions, Supreme Court enjoined petitioner from operating its landfill as such operation would be in violation of Section 3 of the 1988 law. However, as Supreme Court further found that the 1988 law did not apply to transfer stations, it denied the Town's request that petitioner be enjoined from operating its transfer station.

On cross-appeals by both petitioner and the Town, the Appellate Division of the State of New York, Third Department, affirmed in its entirety Supreme Court's decision. (Pet. App. 1a, reported at 294 A.D.2d 766). As pertinent here, the appellate court concluded that Supreme Court's severance of Section 4 was proper under New York law. (Pet. App. 6a-7a).

REASONS FOR DENYING THE WRIT

Petitioner argues that Local Law 1 of 1988 should be struck down in its entirety as unconstitutional. Prior to analyzing petitioner's arguments in support, it is worthwhile to analyze two arguments it does not make as such failure reveals much about the lack of merit to the arguments it does make, and why petitioner has failed to present any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the dismissal of his case.

Initially, it is notable that petitioner makes no argument that the Courts below erred in concluding the ban in Section 3 of

Local Law 1 of 1988 covering all dumps was constitutional and rejecting its Commerce Clause challenge thereto. Such failure is not entirely remarkable in view of the Second Circuit's upholding the validity of a similar ordinance in *Peake Excavating v. Town Bd. of Town of Hancock*, 93 F.3d 68, 74-75 (2d Cir. 1996).

Secondly, petitioner makes no argument that New York's severability doctrine under which New York courts may sever the unconstitutional part of a statute from its constitutional part and permit the enforcement of the constitutional part is per se unconstitutional. The New York test for severability is "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalidity part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920), cert denied. 256 U.S. 702 (1921) (Cardozo, C.J.); see also *People v. Liberta*, 64 N.Y. 152 (1984), cert denied. 471 U.S. 1020 (1985); *Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 194 (1984). Of note, while the severability doctrine is a doctrine for the state courts to promulgate, see *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d. Cir. 1991), the federal severability doctrine as promulgated by this Court is substantially similar. See, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-685 (1987). The application of the federal doctrine has never been challenged as per se unconstitutional, much less condemned as such. See generally Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227 (2004).

With this precedent in place, petitioner thus attempts to circumvent it by arguments which are totally unconvincing and are nothing more than a misguided effort to create issues worthy of this Court's consideration where none exists.

A. The Application Of The Severability Doctrine Here Did Not Result In The Enactment Of A Criminal Statute By A State Court Rather Than The Governing Town Board

Petitioner seeks to find fault with the decisions below because through their application of New York's severability doctrine the courts, instead of the Town Board, enacted a criminal statute, i.e., Section 3 of Local Law 1 of 1988 without any exception. Pet. 5. The argument is meritless.

In view of the historical underpinning of the doctrine, namely the advancement of the legislative body's intent and the need to determine if the legislative body would have intended the enforcement of the unoffending or constitutional part of the statute absent the invalid or unconstitutional part, implicit in a court's application of the severability doctrine to uphold the severed part, as here, is that the legislative body had in effect approved a statute without the severed offending language. See *United Sates v. Jackson*, 390 U.S. 570, 585 (1968). This is especially so when there is, as here, a severability clause in the statute. See, *INS v. Chadha*, 462 U.S. 919, 932 (1983).

Here, the Courts below concluded upon a finding of the Town Board's intent, that the Town Board was enacting a provision of law, Section 3, which it wanted enforced, irrespective of any future striking down of Section 4's exception thereto. Notably, petitioner makes no argument to the contrary regarding the Town Board's intent. With this determination of intent in mind, petitioner's specific argument is clearly devoid of any merit.

Significantly, petitioner cites no authority, case law or commentary, which supports its contention. Suffice it to say, the cases petitioner does cite, *Moses Lake Homes, Inc. v. Grant*

County, 365 U.S. 744 (1961) and *United States v. Bass*, 404 U.S. 336 (1971), are wholly inapposite.

In sum, petitioner's argument is nothing more than a transparent attempt to convince this Court that there is an inherent constitutional problem with the severability doctrine when plainly there is none.

B. The Application Of The Severability Doctrine Here Does Not Result In A Situation Where There Is Now A Failure To Give To The Populace Proper Notice That The Disposal Of Their Own Waste On Their Property Is Now Criminal Conduct

Petitioner also seeks to find fault with the application of the severability doctrine here because with the legal severance of Section 4 from Section 3 of the Local Law 1 of 1988, a property owner in the Town would not know that the disposal of his/her own waste on his/her property is a criminal act because such severance is not then implemented, apparently, by a Town official physically excising Section 4 from the law as available in the Town Clerk's Office or in the Office of the New York State Secretary of State. Pet. 4-5. This argument is also meritless.

To be sure, New York's severability doctrine, like the federal severability doctrine, does not require the physical excising of the offending part of a statute from the publicly available copies of said statute once a court decides to engage in a severance. However, notice of such severance will be available by even a cursory review of the law as interpreted, and as a general practice in New York such declarations of unconstitutionality are noted by the legislative body's officials. Thus, there is surely no need to announce as a matter of federal constitutional law

that application of the severability doctrine requires an actual physical excision of the offending part of the statute.

In sum, petitioner fails to recognize that there are means available to get the word out that a statute has been "severed" because part of it is unconstitutional. There is no need for a constitutional fiat requiring physical excision.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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May 12, 2004

(3)

No. 03-1390

IN THE

Supreme Court of the United States

WASTE RECOVERY ENTERPRISES, LLC.,

Petitioner,

-v-

TOWN OF UNADILLA and TOWN SUPERVISOR
JAMES A. WESTCOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

POINT I

THE SUBSTANTIVE RESULT OF THE SEVERANCE IS TO CAUSE AN UNCONSTITUTIONAL DEPRIVATION OF RIGHTS

Respondents cite to *People v. Liberta*, 645 N.Y. 2d 152 (1984), cert. denied 471 U.S. 1020 (1985). *Liberta* is both instructive and distinguishable from the case in question.

A. *Liberta* involved a statute which defined rape as a crime which could be only committed by a male against a female. Amongst other defenses, the defendant alleged the rape statute violated the "equal protection provision because only men, and not women," could be prosecuted @158.

Rape and other gender based laws arose out of an historical artifact concerning the role and rights of woman. As the court quoted Mr. Justice Holmes in *Liberta* @167 "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." 10 Harv. L Rev 457, 469.

Without reference to any severance provision in the law, the court in *Liberta* found certain provisions of the law unconstitutional as violating equal protection, severed a part of the law, and rewrote the word "male" to read person. Pointing out the horrific consequences of reversing the conviction on equal protection grounds, the court affirmed the conviction because "the defendant is simply not similarly situated to those persons who were not within the scope of the statutes as they existed prior to our decision." @173. See generally "A Norm-Based Remedial Model for Underinclusive Statutes" 95 Yale L. Journal 1185 and specifically fns. 81, 88.

Respondents in their Brief in Opposition in this case treat this Petition as simply a case where the scope of the legislative power to sever is the question before the court. But that is really not the question. The question could better be framed: Even if the legislative body would have liked the court to sever the exception and broaden the scope of the criminal law, substantively can the courts allow that to happen.

Should a legislative body be allowed to allow, and should a court be allowed to, with or without legislative authorization, sever an exception to a criminal law such that as a result of the court's action, the criminal law becomes broader, rather than narrower, without public notice, public comment and an action by the legislative body that puts the public, the target of the law, on notice that if they take the prescribed action, they are committing a crime for which they could be imprisoned for a substantial period of time.

In *Bouie v. City of Columbia*, 378 US 347, the State Supreme Court broadened its interpretation of a criminal law:

> The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction. . . @ 352

That is precisely the situation created by the court's severance of the exception in this case.

Perhaps because of the difficulty of prosecuting a female for rape when females are not named as potential defendants in the statute, the State of New York amended the law in question the

year following this Court's denial of cert (Ch 810 laws of 1987) to make the statute gender neutral.

B. The present case involves not an historic artifact based upon sex discrimination and equal protection, but a violation of the Commerce Clause of the Constitution Art. I, § 8, clause 3 the provision that led the early American government to draft and adopt the Constitution as a successor to the Articles of Confederation. Unlike a sex based equal protection argument, the State Courts' decisions have the result of sanctioning the last remnant of three local laws all of which violated the Commerce Clause as written and two of which have already been struck down by the NY Courts in their entirety. Waste Recovery Enterprises would also be subject to the law as rewritten by the courts. In those circumstances, regardless of a severance provision likely added to the cookie cutter law with little thought, the law should be struck in its entirety and not salvaged in a way which makes this criminal law broader rather than narrower.

CONCLUSION

Certiorari should be granted, and the Order of the state Courts modified to find the law unconstitutional in its entirety.

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